Even if we should hold that the appellant's solicitors had acted in good faith we are unable to say that the appellant himself had so acted. As a licensed moneylender for a period of years he could not have been ignorant of the fact that he had breached the Moneylender's Ordinance. In any event he has not said that he had no knowledge of the illegality.

For reasons we have stated it is our view that this appeal must necessarily fail and there should therefore be no order for restitution. It is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *T.S. Chong & Co.; Elyas Majeed.*

MOHAMED IBRAHIM & ANOR. v. CHRISTOPHER PIFF & ANOR.

[F.C. (Suffian L.P., Wan Suleiman & Chang Min Tat F.JJ.) October 28 & November 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 56 of 1979]

Tort — Accident resulting in brain damage — Damages — Special damages — Air passages for family to London and back — Expenses of special schooling — Whether appellate court should interfere with award of trial judge.

Damages — Brain injury — Special damages — Expenses of special schooling.

The second respondent, a school girl aged 7 years was involved in an accident whilst being driven in her father's car with a bus driven by the 1st appellant. The accident resulted in brain damage. Liability was admitted and the appeal was only on the quantum of damages. It was argued (a) that special damages for air passages to London and back for the whole family should be reduced; (b) that the sum of $65,000 awarded for the expenses of special schooling was far too much.

Held: (1) in the special circumstances of this case the special damages awarded for air passages for the family should remain unaltered;

(2) the sum awarded for the expenses of special schooling was justified.

Cases referred to:-

(1) *Schneider* v. *Eisovitch* [1960] 2 Q.B. 430.

(2) *Harris* v. *Harris* [1973] 1 LL L.R. 445.

(3) *Fletcher* v. *Autocar & Transporters Ltd.* [1968] 1 All E.R. 726.

(4) *Davies* v. *Powell Duffryn Associated Collieries* [1942] A.C. 601 at p. 616.

FEDERAL COURT.

Khoo Eng Chin (*Miss John* with him) for the appellants.

Cecil Abraham for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The 2nd respondent, a school girl aged 7 years was involved in an accident whilst being driven in her father's car with a bus driven by the 1st appellant. The accident resulted in brain damage. Liability was admitted by appellants, and evidence was adduced merely to decide on quantum.

This appeal arose out of appellants' dissatisfaction with the award on two items of special damages viz. cost of air passage for the whole family from Kuala Lumpur to London including that for the unconscious Allison, $10,866 Item (2), and cost of the return passage for the whole family from London to Kuala Lumpur, $6,016.50 Item (3). Two seats had to be allocated to Allison on the trip to London because of her unconscious state.

Mr. Khoo for the appellants contends that items (2) and (3) should be reduced. Though, in this family of five members, the other 2 children are 6 years and 2 years old, counsel says that only one parent need accompany the ailing child and the medical officer, whilst the other could stay at home to tend to the remaining two.

For the respondents, it was argued that the obvious choice would be the mother, if only one parent could go, which would mean that the father would have to stay away from work to care for the two young ones. There was no evidence to indicate whether the family had adequate household servants to do so on their own or whether additional staff would have to be employed. Mr. Abraham insisted that with the child in a coma, it was reasonable that both parents should be entitled to accompany her.

No argument as to how many members of the family should be entitled to claim under items (2) and (3) was raised before the trial judge. It is not in dispute that the passage of the whole family to England and back to this country was treated as home leave passage and was paid for by the firm.

However the appellants had even made an attempt for both these items, referred to as items (7) and (8) of the particulars of special damages, to be disallowed altogether, saying that the whole expense should be treated as home leave passage paid for by respondents' employers. In reply counsel for the respondents had countered that by being compelled to avail themselves of this enforced vacation they had deprived themselves of a real vacation which in the normal course of events, they would have taken later.

The learned trial judge had taken into account the fact that he sacrificed his home leave entitlement for himself and his family to enable him to finance Allison's transfer to England for proper treatment. It is indeed true that the 1st respondent and his family not only sacrificed the pleasures of a real home leave, for the parents at least must have spent a considerable period of their stay hovering around their ailing daughter. They had also effected some economies by obviating the need for additional household help which would otherwise be necessary to tend to their two younger children if the mother alone had accompanied Allison to England, and leaving the respondent to cope with his employment.

In short what the 1st respondent and his family did was equivalent to his taking the money his employers had set aside for the home leave passage, and spending that sum to accompany the daughter home in order to get her more specialised medical treatment, the journey having become necessary because of the act of negligence on the part of appellants. The respondents were entitled to reimburse-

ment as if the money had come from their own pockets, and there was no need for respondents to undertake to refund such sum to the provider as the plaintiff had to do under the different circumstances of *Schneider* v. *Eisovitch*,[1] in order to be entitled to recover. We therefore feel that in the special circumstances, both sums awarded should remain unaltered.

What we hold here should not be seized upon as authority for the proposition that a whole family should be entitled to claim air fare to accompany an injured member to another country for medical treatment. This cautionary note finds support in *Kemp & Kemp* Vol. 1 4th Edition at page 112 where it is said: "No useful purpose would be served by citing an extended list of cases in which particular types of expense have been held to be recoverable. In every case the court must decide whether it would be reasonable to incur the particular expense; that is a question of fact and degree to be determined on the facts of the particular case."

The appellants also say that the sum of $65,000 awarded for the expenses of special schooling is far too much, and that even if Allison had gone to a state school where she would have gone but for the accident, expenses would be involved. It was suggested that 50% be deducted from the sum awarded, without reason being advanced for, or calculations provided to support such drastic reduction.

Counsel for appellants is clearly in error in suggesting that there is no evidence that there are special schools which can benefit cases of this sort.

Miss Studebaker, consultant in learning disorders called by the respondents, recommended specialised schooling for Allison. This witness said that Allison needed a teacher who could react to her in a special way, because her performance was slow and she would not be able to attain achievements at the rate of her peers.

Another witness, the Principal of the Alice Smith School where Allison had been for one term before the accident, and to which she returned for a spell afterwards, and who was therefore in a position to note a change for the worse, also was of the view that Allison would need special education for some time.

Harris v. *Harris*[2] was cited as an instance where a school girl who had suffered brain injury was given an award of extra school fees for transfer to a public school after her accident, her pre-injury school having been found no longer suitable.

It is common knowledge that state schools in the United Kingdom do not charge school fees. The learned trial judge had accepted Allison's father's testimony that on his return to U.K. at the completion of his present contract, all the children, including Allison had she not been affected by the accident, would continue their education in state schools, because the expense of a public school was beyond his means. Whilst there were state schools catering for mentally subnormal children he testified Allison was not mentally retarded, but a girl of average intelligence who as a result of the accident has a severe learning difficulty. He found just such a public school (see Exhibit P7) where the fee was £645 per term.

Mr. Khoo, in urging a reduction in the figure of the award, cited the case of *Fletcher* v. *Autocar & Transporters Ltd.*,[3] based on the principle that in assessing additional expenses all economies consequent on the action taken that involved the expenses claimed should be brought into consideration.

With respect, it is clear that the learned trial judge has not overlooked that principle. With inflation pushing up school fees, and there is evidence at the trial to that effect, the £650 per term of his award may seem modest, as at the end of seven years Allison would normally be expected to remain in school.

It would not be amiss to repeat what Lord Wright said in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[4]:

"Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases. but a good general guide is given by Greer L.J. in *Flint* v. *Lovell* [1935] 1 K.B. 354. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Adlan & Hj. Suhaimi; Shearn Delamore & Co.*

MUHARAM BIN ANSON v. PUBLIC PROSECUTOR

[F.C. (Seah Ag. C.J. (Borneo), Chong Siew Fai & Wan Mohamed JJ.) December 1, 1980]

[Kota Kinabalu — Federal Court Criminal Appeal No. 14 of 1980]

Criminal Law and Procedure — Mischief by fire — Evidence of visual identification — Discretion of prosecution in calling witnesses — Evidence of child for defence — Sentence — Penal Code, s. 436.

The appellant had been convicted of the offence of mischief by fire in that he set fire to a dwelling house intending to cause the destruction of the building. On appeal it was argued that (a) as the evidence against the appellant depended on the visual evidence of identity by the complainant and his wife there was the possibility that the appellant had been wrongly identified; (b) that the prosecution had failed to call the son of the complainant at the trial; (c) that the learned trial judge had failed to accept the testimony of the child of the appellant who gave evidence for the defence; (d) that the sentence of six years' imprisonment was excessive.

Held: (1) the learned trial judge had subjected the testimonies of the complainant and his wife to close scrutiny. This was more a case of recognition than of identification and the learned trial judge was justified on the evidence in holding that it was the appellant who had wilfully set fire